MIMS Career Sdn Bhd v Armand Mikhayl Yeoh Abdullah & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-833–11 OF 2024
WAN MUHAMMAD AMIN J
12 JUNE 2025

Civil Procedure — Injunction — Application for — Arbitral award registered as judgment of court — Enforcement of judgment through judgment debtor summons — Allegation of fraudulent dispositions and constructive trusts — Whether transfer of assets before registration of judgment — Whether application a pre-judgment Mareva injunction in fresh tracing action — Whether application a post-judgment Mareva application in aid of execution — Whether requirements for injunction sought satisfied

This was the plaintiff's application vide encl 3 for a Mareva injunction against the first to fourth defendants. The plaintiff obtained an arbitral award ('the award') against the first to third defendants ('principal defendants'), which was subsequently enforced/registered as a judgment of the court ('enforcement judgment'). Following registration of the award, the plaintiff sought to enforce the enforcement judgment against the principal defendants through judgment debtor summons ('JDS') proceedings. During the course of these JDS proceedings, it was discovered that the principal defendants had transferred assets to the fourth to seventh defendants, with these transfers occurring largely before the award was made, and a few occurring after the award but prior to its registration. While the overall pattern of transfers involved the fourth to seventh defendants and other recipients, the plaintiff sought to recover assets from all the defendants (first to seventh defendants) through this fresh action, alleging fraudulent dispositions and constructive trusts, whilst simultaneously seeking Mareva injunctive relief against only the first to fourth defendants. The issue that arose for determination were: (a) whether the present application was a pre-judgment Mareva injunction in a fresh tracing action or a post-judgment Mareva application in aid of execution; and (b) whether the necessary requirements for the alleged injunction had been satisfied.

Held, dismissing the application with costs in favour of the first to fourth defendants:

(1) Despite the plaintiff's characterisation of the present application as a pre-judgment Mareva application, the substance and purpose of the application revealed that it was, in reality, a post-judgment Mareva application presented under the guise of a pre-judgment one. This was

because: (a) the present application was expressly tied to enforcement of the award registered as a judgment (enforcement judgment); (b) the plaintiff had repeatedly submitted that the principal defendants dissipated assets in order 'to defeat' the award and enforcement judgment; and (c) the relief sought in the present application was to preserve assets for satisfaction of an existing judgment debt (see para 12).

(2) The plaintiff's current claim was based on constructive trust and conspiracy, which were essentially enforcement mechanisms intended to recover assets connected to the existing judgment, ie the enforcement judgment. To put it simply, the constructive trust claim arose from the allegation that the principal defendants dissipated assets in order to avoid satisfaction of the award, which was subsequently registered. Also, the present application came after extensive JDS proceedings where the very same asset transfers were discovered and examined. Therefore, in the present action the plaintiff was seeking to recover those very assets (see para 12).

(3) This application suffered from a fundamental conceptual flaw. It attempted to obtain post-judgment relief (preservation of assets for enforcement of an existing judgment) through the mechanism of a pre-judgment application in a fresh action. This was procedurally improper and legally untenable (see para 18).

(4) In the case of a post-judgment Mareva injunction, the proper procedure required: (a) bringing the application before the court in which the judgment was obtained; (b) satisfying the legal test applicable to a post-judgment Mareva injunction application; and (c) demonstrating that the injunction was sought in aid of execution of the judgment. The plaintiff could not circumvent these requirements by fashioning the present application as a pre-judgment Mareva injunction through a fresh action, while in substance seeking relief that was effectively in aid of execution of an existing judgment. On this ground alone, the present application may be dismissed (see paras 19–21).

(5) The delay in bringing the present application was significant and substantially weakened the plaintiff's claim of an imminent risk of asset dissipation by the defendants. The materiality of any delay was a crucial consideration in a Mareva injunction application and had the potential to vitiate the application. The plaintiff's ground in support of the present application, namely, that the principal defendants dissipated assets 'to avoid' the award or the enforcement judgment, was untenable. It did not constitute a pre-emptive act justifying a pre-judgment Mareva injunction but rather appeared to relate to post-award/enforcement judgment conduct aimed at aiding enforcement. This was particularly so given that the alleged asset dissipation all occurred prior to the enforcement

judgment. Regardless of the approach, the plaintiff was hindered by this fundamental flaw in the application (see paras 38 & 41).

(6) The plaintiff had already pursued various enforcement avenues in respect of the enforcement judgment, including the JDS and garnishee proceedings. The present application for a Mareva injunction appeared to be an extension of its recovery efforts and gave rise to a multiplicity of proceedings. Accordingly, the balance of convenience weighted against the grant of this application. Further, the fourth defendant was, at most, a passive recipient, not an active dissipator. The plaintiff had not established any real or specific risk of dissipation by the fourth defendant himself. Instead, it relied on a theory of 'liability by association,' premised solely on the fact that he was the son of the judgment debtors. Such reasoning was legally insufficient (see paras 46–47 & 49).

(7) The fourth defendant voluntarily undertook not to deal with the property pending the outcome of the present application, a conduct which was inconsistent with any risk of dissipation. It was also relevant that he had held the property for a considerable period without any indication or attempt to dispose of it. The consequences of granting a Mareva injunction against the fourth defendant would be severely disproportionate. Hence, the balance of convenience favours a refusal of the present application, in particular against the fourth defendant (see paras 50–52).

[Bahasa Malaysia summary

Permohonan ini adalah permohonan plaintif melalui lampiran 3 bagi mendapatkan injunksi Mareva terhadap defendan pertama hingga keempat. Plaintif telah memperoleh suatu anugerah timbang tara ('anugerah tersebut') terhadap defendan pertama hingga ketiga ('defendan utama'), yang kemudiannya dikuatkuasakan/didaftarkan sebagai suatu penghakiman mahkamah ('perintah perlaksanaan'). Susulan pendaftaran anugerah tersebut, plaintif telah mengambil langkah untuk menguatkuasakan perintah perlaksanaan itu terhadap defendan utama melalui prosiding saman penghutang penghakiman ('SPP'). Dalam perjalanan prosiding SPP tersebut, didapati bahawa defendan utama telah memindahkan aset kepada defendan keempat hingga ketujuh, dengan pemindahan tersebut berlaku pada umumnya sebelum anugerah dibuat, dan sebahagian kecil daripadanya berlaku selepas anugerah tetapi sebelum pendaftarannya. Walaupun corak keseluruhan pemindahan melibatkan defendan keempat hingga ketujuh serta penerima lain, plaintif kini berusaha mendapatkan kembali aset daripada semua defendan (defendan pertama hingga ketujuh) melalui tindakan baharu ini, dengan mendakwa adanya pelupusan secara fraud dan kewujudan amanah konstrukif. Pada masa yang sama, plaintif memohon injunksi Mareva terhadap hanya defendan pertama hingga keempat. Isu-isu yang timbul untuk diputuskan ialah: (a) sama ada permohonan ini merupakan injunksi Mareva

pra-penghakiman dalam suatu tindakan pengesanan baharu, atau injunksi Mareva pasca-penghakiman sebagai bantuan kepada pelaksanaan penghakiman; dan (b) sama ada keperluan undang-undang bagi injunksi tersebut telah dipenuhi.

Diputuskan, menolak permohonan dengan kos memihak kepada defendan pertama hingga defendan keempat:

(1) Walaupun plaintif mengklasifikasikan permohonan ini sebagai satu permohonan Mareva pra-penghakiman, namun dari segi isi dan tujuan, permohonan ini sebenarnya merupakan satu permohonan Mareva pasca-penghakiman yang dikemukakan seolah-olah ianya pra-penghakiman. Hal ini kerana: (a) permohonan ini secara jelas berkait rapat dengan penguatkuasaan anugerah timbang tara yang telah didaftarkan sebagai penghakiman mahkamah ('perintah perlaksanaan'); (b) plaintif secara konsisten menghujahkan bahawa defendan-defendan utama telah melupuskan aset bagi 'menggagalkan' anugerah tersebut dan perintah perlaksanaan tersebut; dan (c) remedi yang dipohon menerusi permohonan ini adalah bagi tujuan memelihara aset untuk menyelesaikan hutang penghakiman yang sedia ada (lihat perenggan 12).

(2) Tuntutan plaintif dalam tindakan ini adalah berasaskan amanah konstruktif dan konspirasi, yang secara hakikatnya merupakan mekanisme penguatkuasaan untuk mendapatkan kembali aset yang berkaitan dengan penghakiman sedia ada, iaitu perintah perlaksanaan. Ringkasnya, tuntutan amanah konstruktif tersebut berpunca daripada dakwaan bahawa defendan-defendan utama telah melupuskan aset bagi mengelakkan pelaksanaan anugerah tersebut yang kemudiannya telah didaftarkan sebagai penghakiman. Tambahan pula, permohonan ini difailkan selepas prosiding SPP yang panjang, di mana pelupusan aset yang sama telah didedahkan dan disiasat. Oleh itu, dalam tindakan ini, plaintif sebenarnya sedang berusaha mendapatkan kembali aset-aset tersebut (lihat perenggan 12).

(3) Permohonan ini mempunyai kecacatan asas dari sudut konsep. Ianya cuba mendapatkan relif pasca-penghakiman (pemeliharaan aset bagi tujuan pelaksanaan suatu penghakiman yang telah wujud) melalui mekanisme permohonan pra-penghakiman dalam satu tindakan baharu. Pendekatan ini adalah tidak betul dari segi prosedur dan tidak dapat dipertahankan dari sudut undang-undang (lihat perenggan 18).

(4) Bagi suatu injunksi Mareva pasca-penghakiman, prosedur yang betul memerlukan: (a) permohonan dibuat di hadapan mahkamah yang telah memberikan penghakiman tersebut; (b) pemohon memenuhi ujian undang-undang yang terpakai bagi permohonan injunksi Mareva pasca-penghakiman; dan (c) menunjukkan bahawa injunksi tersebut dipohon sebagai bantuan kepada pelaksanaan penghakiman tersebut.

Plaintif tidak boleh mengelak daripada keperluan-keperluan ini dengan menggambarkan permohonan ini sebagai injunksi Mareva pra-penghakiman dalam suatu tindakan baharu, sedangkan dari segi asas permohonan ini plaintif sebenarnya memohon relif yang bertujuan membantu pelaksanaan penghakiman yang telah pun wujud. Atas alasan ini sahaja, permohonan ini boleh ditolak (lihat perenggan 19–21).

(5) Kelewatan dalam membawa permohonan ini adalah ketara dan telah secara material melemahkan dakwaan plaintif bahawa terdapat risiko segera berlakunya pelupusan aset oleh para defendan. Materialiti apa-apa kelewatan merupakan pertimbangan penting dalam sesuatu permohonan injunksi Mareva dan berpotensi menggagalkan permohonan tersebut. Alasan plaintif bagi menyokong permohonan ini, iaitu bahawa defendan-defendan utama telah melupuskan aset 'bagi mengelakkan' anugerah tersebut atau perintah perlaksanaan, adalah tidak munasabah. Perbuatan tersebut tidak membentuk suatu tindakan pra-emptif yang boleh mewajarkan injunksi Mareva pra-penghakiman, sebaliknya ianya jelas berkaitan dengan kelakuan pasca-anugerah/pasca-penghakiman penguatkuasaan yang bertujuan untuk membantu proses penguatkuasaan. Perkara ini lebih ketara memandangkan pelupusan aset yang didakwa semuanya berlaku sebelum penghakiman penguatkuasaan tersebut. Tanpa mengira pendekatan yang diambil, plaintif tetap terhalang oleh kelemahan asas yang wujud dalam permohonan ini (lihat perenggan 38 & 41).

(6) Plaintif telahpun mengambil pelbagai langkah penguatkuasaan mengenai perintah perlaksanaan tersebut tersebut, termasuk prosiding SPP dan prosiding garnisi. Permohonan Mareva dalam tindakan ini dilihat sebagai lanjutan kepada usaha kutipan hutangnya dan menimbulkan suatu penggandaan prosiding. Sehubungan itu, imbangan kemudahaan adalah tidak memihak kepada pemberian injunksi Mareva ini. Tambahan pula, defendan keempat hanyalah penerima pasif, bukannya pihak yang secara aktif melakukan pelupusan aset. Plaintif juga gagal membuktikan risiko sebenar atau khusus mengenai kemungkinan defendan keempat akan melupuskan aset miliknya. Sebaliknya, hujahan plaintif hanya berasaskan teori 'liabiliti melalui perkaitan' semata-mata kerana defendan keempat ialah anak kepada penghutang penghakiman. Hujahan sedemikian adalah tidak mencukupi dari segi undang-undang (lihat perenggan 46–47 & 49).

(7) Defendan keempat secara sukarela telah memberi akujanji untuk tidak melupuskan hartanah tersebut sementara menunggu keputusan permohonan ini, suatu tindakan yang tidak selaras dengan apa-apa risiko pelupusan aset. Adalah turut relevan bahawa defendan keempat telah lama memegang hartanah itu tanpa apa-apa tanda atau cubaan untuk melupuskannya. Kesan pemberian injunksi Mareva terhadap defendan

keempat akan menjadi terlalu tidak seimbang. Oleh yang demikian, imbangan kemudahan dengan jelas memihak kepada penolakan permohonan ini, khususnya terhadap defendan keempat (lihat perenggan 50–52).] A

Cases referred to B

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)

Ang Chee Huat v Engelbach Thomas Joseph [1995] 2 MLJ 83, CA (refd)

Asma Baizura bt Mohamad Omar & Anor v Pengiran Dato' Awang Daud bin Awang Putra & Anor [2023] MLJU 474, HC (refd) C

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)

Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd [2015] MLJU 953, HC (refd) D

Dopag Dosiertechnik und Pneumatik AG (suing as the majority shareholder of Dopag Far East Sdn Bhd and acting in the interest of Dopag Far East Sdn Bhd) v Gamel Nasir Taib & Ors [2017] 10 MLJ 31, HC (refd)

George Pathmanathan a/l Michael Gandhi Nathan v Portcullis International Ltd & Ors [2017] MLJU 1223, HC (refd) E

Hitachi Leasing (Singapore) Pte Ltd v Vincent Ambrose & Anor [2001] SCD 101; [2001] 1 SLR(R) 762, HC (refd)

Itramas Technology Sdn Bhd v Maju Holdings Sdn Bhd & Ors [2020] MLJU 1663; [2020] CLJU 1487; [2021] MLRHU 559, HC (refd)

Jtrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2021] SCD 104; [2021] SGCA 26, CA (refd) F

Lien Hoe Sawmill Co Sdn Bhd v Yap Sing Hock & Ors [1992] 2 CLJ Rep 727, HC (refd)

Mareva Compania Naviera SA v International Bulkcarriers SA; The Mareva [1975] 2 Lloyd's Rep 509, CA (refd) G

Menk Sdn Bhd v Joerg Hugo Schmidt [2009] 3 MLJ 205; [2009] 4 CLJ 795, CA (folld)

Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd [1984] 1 WLR 1097, QBD (refd)

PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (distd) H

Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261 (refd)

S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62; [1985] 2 CLJ 228, FC (refd)

Shim Yen Lin v Cedric Wong King Ti [2021] 11 MLJ 350, HC (refd) I

Sun Electric Pte Ltd & Anor v Menrva Solutions Pte Ltd & Anor [2020] SCD 22; [2020] SGHC 18, HC (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Chua Lay Kim (P) & Ors [2015] MLJU 2111; [2016] 3 CLJ 84, CA (distd)

A *The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals* [2022] 1 MLJ 316, CA (refd)

Tan Shang Neng (with Ricci Oly Ting) (Tan Shang Neng) for the plaintiff.
Mohd Rezan Ezra bin Muhammad Mosinal (with Nathalie Annette Kee Xuan Li and Ivan Teng Jun Hong) (Thomas Philip) for the first, second, third, sixth and seventh defendants.
B *Pavitra Pillai (with Sara bt Jailany) (M David Morais) for the fourth and fifth defendant.*

C **Wan Muhammad Amin J:**

[1] This is the plaintiff's application in encl 3 for a Mareva injunction against the first to fourth defendants ('this application' or 'encl 3').

D SALIENT BACKGROUND FACTS

[2] The parties are not in dispute regarding the essential factual background. The plaintiff obtained an arbitral award against the first to third defendants ('principal defendants') on 16 March 2020 ('the award'), which was E subsequently enforced/registered as a judgment of the court on 7 December 2021 ('enforcement judgment'). The award has been affirmed through all levels of court up to the Federal Court.

[3] Following registration of the award, the plaintiff sought to enforce the F enforcement judgment against the principal defendants through judgment debtor summons ('JDS') proceedings *commenced on 26 May 2022*. During the course of these JDS proceedings, it was discovered that the principal defendants had transferred assets to the fourth to seventh defendants, with these *transfers* occurring largely *before* the award was made in *March 2020*, and G a few occurring *after* the award but *prior to* its *registration* in *December 2021*. For instance, property for the fourth defendant was purchased in *June 2019*, well before the award was made.

[4] While the overall pattern of transfers involved the fourth to seventh H defendants and other recipients, the plaintiff seeks to recover assets from *all* the defendants (first to seventh defendants) through this fresh action (the present act), alleging fraudulent dispositions and constructive trusts, whilst simultaneously seeking Mareva injunctive relief against only the first to fourth defendants.

I THE PLAINTIFF'S CLAIM

[5] The reliefs the plaintiff seeks against the defendants in this action based on its statement of claim can be summarised as follows:

(a) against the first defendant:

(i) an account and inquiry regarding the disposition of RM29,266,690.68 from the first defendant's Public Bank account and all gifts, settlements, or inheritance allegedly made between 16 January 2018 and 16 March 2023;

(ii) declarations that recipients of such gifts hold them on constructive trust for the first defendant; and

(iii) orders for immediate payment of monetary gifts to the plaintiff toward settlement of the award (the final award) and *judgment sum* (the enforcement judgment incorporating the award plus accumulated interest and costs), or alternatively declarations that such gifts be subject to execution.

(b) against the second to fifth defendants:

(i) declarations that the transfer of property at No 25 Jalan 12/17, Petaling Jaya, Selangor to the fifth defendant be declared void for fraudulent disposition and restored to the second defendant, with associated restoration costs borne by the second and/or fifth defendants;

(ii) alternatively, declarations that the fifth defendant holds the said property on constructive trust for the second defendant; and

(iii) declarations that the property be subject to execution for the award and judgment sum.

(c) against the second and seventh defendants:

(i) declarations that the transfer of the Pinggiran Golf Property at No 8 Pinggiran Golf, Saujana Resort, Shah Alam, Selangor to the seventh defendant be declared void for fraudulent disposition and restored to the second defendant, with associated costs borne by the second and/or seventh defendants;

(ii) alternatively, declarations that the seventh defendant holds the said property on constructive trust for the second defendant; and

(iii) declarations that the property be subject to execution for the award and judgment sum.

(d) against the third defendant:

(i) declarations that the transfer of the Pinggiran Golf Property at No 8 Pinggiran Golf, Saujana Resort, Shah Alam, Selangor to the seventh defendant be declared void for fraudulent disposition and restored to the second defendant, with associated costs borne by the second and/or seventh defendants;

(ii) alternatively, declarations that the seventh defendant holds the said property on constructive trust for the second defendant; and

(iii) declarations that the property be subject to execution for the award and judgment sum.

(e) against the sixth and seventh defendants:

(i) declarations that the transfer of property at 14 Jalan 12/15, Petaling Jaya, Selangor to the sixth defendant be declared void for fraudulent disposition and restored to the third defendant, with associated costs borne by the third and/or sixth defendants;

(ii) alternatively, declarations that the sixth defendant holds the said property on constructive trust for the third defendant; and

(iii) declarations that the property be subject to execution for the award and judgment sum.

(f) against the fourth defendant:

(i) declarations that RM300,000 transferred by the first defendant to the fourth defendant is held on constructive trust for the first defendant;

(ii) orders for immediate payment of the said sum to the plaintiff toward settlement of the award and judgment sum;

(iii) declarations that the property at Parcel No A1–15–01, Damansara ('the fourth defendant's property') is held on constructive trust for the first defendant; and

(iv) declarations that the fourth defendant's property be subject to execution for the award and judgment sum.

(g) against the fifth defendant:

(i) declarations that the property at Parcel No A1–16–3A, Damansara ('the fifth defendant's property') is held on constructive trust for the first defendant; and

(ii) declarations that the fifth defendant's property be subject to execution for the award and judgment sum.

(h) against the seventh defendant:

(i) declarations that RM7,700,005 transferred by the first defendant to the seventh defendant is held on constructive trust for the first defendant; and

(ii) orders for immediate payment of the said sum to the plaintiff toward settlement of the award and judgment sum.

(i) general relief against the first to third defendants:

(i) discovery and/or tracing orders as necessary in aid of the above reliefs; and

(ii) general, aggravated and/or exemplary damages.

THE RELIEFS SOUGHT IN THIS APPLICATION

[6] The Mareva injunction sought in this application is only against the first to fourth defendants in which the plaintiff seeks:

(a) asset freeze orders preventing the removal or disposal of assets, up to the value of RM16m, applicable to assets both within and outside Malaysia.

(b) disclosure orders requiring the first to fourth defendants to affirm and file affidavits disclosing all assets worldwide, including their value, location, and details of financial accounts and investment portfolios, within seven days.

(c) an order to specifically restrain the fourth defendant's property at Parcel No A1–15–01, Damansara.

THE TRUE NATURE OF THIS APPLICATION IS A POST-JUDGMENT MAREVA INJUNCTION

[7] The central issue before this court is the true nature of this application. While the plaintiff maintains that this application is a *pre-judgment* Mareva injunction in a fresh tracing action, the defendants contend that it is, in substance, a *post-judgment* Mareva application in aid of execution (*George Pathmanathan a/l Michael Gandhi Nathan v Portcullis International Ltd & Ors* [2017] MLJU 1223; *Shim Yen Lin v Cedric Wong King Ti* [2021] 11 MLJ 350).

[8] The first to third defendants contend that the relief sought is expressly connected to the enforcement of a separate judgment obtained in a different suit against unrelated parties. This characterisation bears the hallmarks of a post-judgment Mareva injunction.

[9] The plaintiff reiterated its position that this application is a pre-judgment Mareva injunction application, and it is *not* in aid of the execution of the award/enforcement judgment, but is based on a *new* cause of action premised upon constructive trust and conspiracy to defraud.

[10] However, this position is inconsistent with the plaintiff's written submissions in encl 41 which states, inter alia, as follows:

(a) para 2, where the plaintiff states:

A When the plaintiff sought to enforce the HC Registration Order through garnishee and judgment debtor summons proceedings, cogent evidence was uncovered demonstrating that D1 to D3 had actively dissipated their assets to others, including the fourth to seventh defendants ('D4' to 'D7'), *to frustrate the Final award.* (Emphasis added.)

B (b) para 3, where the plaintiff, with reference to the statement of claim, states:

Premised upon the above, the plaintiff filed this action on the grounds of fraudulent disposition and constructive trusteeship against D1 to D7 to C recover such assets as was dissipated by D1-D3 *to frustrate the Final award and the HC Registration Order.* (Emphasis added.)

(c) para 23, where the plaintiff states:

When the above is taken as a whole, there is cogent prima facie evidence that D D1-D3 had, contrary to their testimony in the JDS Proceedings, taken steps to fraudulently dispose their assets or provided such assets to third parties, including D4, as constructive trustees *to defeat the Final award*. (Emphasis added.)

E (d) para 26.2, where the plaintiff submits that the fourth defendant's business activities constitute:

prima facie evidence of knowing involvement in D1-D3's scheme *to defeat the Final award*. (Emphasis added.)

F (e) para 28, where the plaintiff concludes:

Finally, we submit that by D1-D3's previous conduct, and by the prima facie case against D1-D4 of fraudulent disposition or involvement, engagement and facilitation of D1-D3's dishonest scheme *to defeat the Final award*, an inference can at this point be reasonably drawn of their lack of probity, G justifying the inference of a risk of dissipation should Encl. 3 not be allowed. (Emphasis added.)

[11] The above statements are consistent with the plaintiff's *statement of claim* and *affidavits* filed in support of encl 3.

H

[12] Therefore, despite the plaintiff's characterisation of this application as a pre-judgment Mareva application, I find that the substance and purpose of the application reveal that it is, in reality, a *post-judgment* Mareva application presented under the guise of a pre-judgment one. The following, inter alia, I supports this conclusion:

(a) this application is *expressly tied* to enforcement of the award registered as a judgment on 7 December 2021 (enforcement judgment);

(b) as highlighted earlier, the plaintiff has repeatedly submitted that the

principal defendants dissipated assets in order 'to defeat' the award and enforcement judgment;

(c) therefore, the relief sought in this application is to preserve assets for satisfaction of an *existing* judgment debt;

(d) the plaintiff's current claim is based on constructive trust and conspiracy, which are essentially enforcement mechanisms intended to *recover assets* connected to the existing judgment, ie the enforcement judgment. To put it simply, the constructive trust claim arises from the allegation that the principal defendants dissipated assets in order to avoid satisfaction of the award, which was subsequently registered;

(e) this application comes *after* extensive *JDS* proceedings where the very *same asset* transfers were discovered and examined; and

(f) in the present action the plaintiff is seeking to recover those very assets.

Post-judgment Mareva injunction requirements

[13] For the grant of a post-judgment Mareva injunction, the established test requires the plaintiff to demonstrate that:

(a) there is a real risk of the debtor dissipating assets with intention to deprive the creditor of satisfaction of the judgment debt; and

(b) the injunction must act as an aid to execution.

(*George Pathmanathan*; and *Shim Yen Lin*.)

Pre-judgment Mareva injunction requirements

[14] For the grant of pre-judgment Mareva injunctions, the plaintiff must satisfy the following three *conjunctive* criteria:

(a) that the plaintiff has a good arguable case on the merits;

(b) that the defendant has assets within the jurisdiction; and

(c) that there is a real risk that the defendant will dissipate or remove those assets to frustrate the satisfaction of any judgment.

(*Mareva Compania Naviera SA v International Bulkcarriers SA; The Mareva* [1975] 2 Lloyd's Rep 509 ;and *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97.)

[15] As can be seen from the above, there are significant differences in the criteria for post-judgment and pre-judgment Mareva injunctions, which I will address below.

Key distinctions between a post-judgment Mareva and pre judgment Mareva injunction

[16] I have summarised the key distinctions between post-judgment and pre-judgment Mareva injunctions in the comparison table below:

No	Aspect	Pre-Judgment	Post-Judgment
1	Purpose	To preserve the defendant's assets pending trial to protect potential future judgment	To aid enforcement of existing established judgment where claim already proven
2	Legal Standard	General risk of asset dissipation or removal to frustrate any judgment (Mareva Compania)	Intentional dissipation with specific intent to deprive creditor of judgment satisfaction (Hitachi Leasing (Singapore) Pte Ltd v Vincent Ambrose & Anor [2001] SCD 101; [2001] 1 SLR(R) 762); Jtrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2021] SCD 104; [2021] SGCA 26).
3	Threshold	Balance of convenience between parties' respective hardships (Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd [2015] MLJU 953).	Necessity — injunction must be essential for enforcement, not merely convenient (Jtrust Asia).

No	Aspect	Pre-Judgment	Post-Judgment
4	Court where the application is made	Any competent court with jurisdiction over the matter where the action is filed and pending trial.	Court where original judgment was obtained (Asma Baizura bt Mohamad Omar & Anor v Pengiran Dato' Awang Daud bin Awang Putra & Anor [2023] MLJU 474).
5	Procedural origin	Fresh standalone application in pending litigation	As an extension of pre-judgment Mareva injunction granted before trial (Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd [1984] 1 WLR 1097; Dopag Dosiertechnik und Pneumatik AG (suing as the majority shareholder of Dopag Far East Sdn Bhd and acting in the interest of Dopag Far East Sdn Bhd) v Gamel Nasir Taib & Ors [2017] 10 MLJ 31; Sun Electric Pte Ltd & Anor v Menrva Solutions Pte Ltd & Anor [2020] SCD 22; [2020] SGHC 18).
6	Timing of the application	Before final judgment while claim is still being determined.	After final judgment has been obtained but before/during execution.

No	Aspect	Pre-Judgment	Post-Judgment
7	'Good Arguable Case' test	'more than being barely capable of serious argument, but not necessarily one that the Judge believes has got more than a fifty per cent chance of success' (S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62; [1985] 2 CLJ 228; Biasamas).	Not applicable — liability has been established and judgment obtained
8	Available alternatives	Limited — main protection is the potential injunction.	Multiple enforcement mechanisms available (JDS, writs of execution, etc).
9	Urgency requirement	Must demonstrate current risk of asset dissipation requiring immediate protection.	Must show current necessity despite existing enforcement options.

[17] The essential difference between pre-judgment and post-judgment Mareva injunctions can be summarised as follows:

(a) pre-judgment Mareva injunctions are to *preserve* a defendant's assets pending the determination of a claim, while post-judgment injunctions assist in *enforcing* an established judgment; and

(b) the former *protects potential rights* (if the applicant obtains judgment in his in favour), while the latter *enforces established rights*, but only when conventional enforcement mechanisms are insufficient and the injunction is necessary to prevent deliberate frustration of the judgment.

The fundamental flaw in this application

[18] Based on the above, this application suffers from a fundamental conceptual flaw. It attempts to obtain post-judgment relief (preservation of assets for enforcement of an existing judgment) through the mechanism of a pre-judgment application in a fresh action. This is procedurally improper and legally untenable.

[19] In the case of a post-judgment Mareva injunction, the proper procedure requires: A

(a) bringing the application before the court in which the judgment was obtained;

(b) satisfying the legal test applicable to a post-judgment Mareva injunction application; and B

(c) demonstrating that the injunction is sought in aid of execution of the judgment.

C

[20] The plaintiff cannot circumvent these requirements by fashioning this application as a pre-judgment Mareva injunction through a fresh action, while in substance seeking relief that is effectively in aid of execution of an existing judgment.

D

[21] On this ground alone, the application may be dismissed. However, for the sake of completeness, I will address the requirements that must be satisfied for the granting of a pre-judgment Mareva injunction, as asserted by the plaintiff.

E

PRE-JUDGMENT MAREVA INJUNCTION: WHETHER THE REQUIREMENTS ARE MET

[22] Even if this application is accepted as a pre-judgment Mareva application, as asserted by the plaintiff, the issue is whether the necessary requirements for such an injunction have been satisfied. F

Good arguable case analysis

[23] The plaintiff relies on the following cases to support its claim and cause of action against the defendants: G

(a) *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 (FC); and

(b) *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Chua Lay Kim (P) & Ors* [2015] MLJU 2111; [2016] 3 CLJ 84 (CA). H

[24] The main similarity between the present action, *PJTV*, and *Tan Sri Dato' (Dr) Rozali* is that they all involve the filing of a fresh suit arising from property transfers by the defendants, based on allegations that the transfers were made with the intention of defeating the respective plaintiffs' claims. I

[25] The main difference between the present case and *PJTV* and *Tan Sri Dato' (Dr) Rozali* is that, unlike in those two cases, where the fraudulent

transfers occurred solely after judgment was obtained, the alleged asset dispositions in the present case took place both *during* the arbitration proceedings (2018–2019) and *after* the award was delivered (December 2020-February 2021). Further, the alleged disposition of assets in present case all occurred before the enforcement judgment.

[26] A further difference is that in the present case, the plaintiff conducted extensive enforcement proceedings (including garnishee proceedings and JDS) in the original court where the enforcement judgment was granted, and is now seeking a Mareva injunction in a fresh suit. This is unlike *PJTV* and *Tan Sri Dato' (Dr) Rozali*, where no such enforcement proceedings were initiated in the original courts, nor were any subsequent Mareva injunction applications filed.

[27] Despite these differences, I generally accept that the plaintiff's pleaded case satisfies the criteria of a 'good arguable case' in that it is 'more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than a fifty per cent chance of success' (*S & F International*).

[28] The threshold to establish a good arguable case is not very high and the plaintiff only needs to demonstrate that they have a fair chance of success and in this regard, they do not need to show that their case is so strong as to warrant summary judgment or that he has a strong prima facie case (*Biasamas*).

Assets within jurisdiction

[29] The first, second, third and fourth defendants, being Malaysian citizens, have not disputed that they have assets within the jurisdiction.

[30] In this regard the Court of Appeal in *The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals* [2022] 1 MLJ 316, held as follows:

> [31] From the evidence adduced, we are of the considered view that there is clear evidence to show that *the Mareva respondents are domiciled and/or have business dealings within Malaysia* and are therefore *likely to have assets within the jurisdiction.* (Emphasis added.)

(See also *Lien Hoe Sawmill Co Sdn Bhd v Yap Sing Hock & Ors* [1992] 2 CLJ Rep 727 at pp 731–732.)

[31] Therefore, this requirement has been satisfied.

Risk of dissipation

[32] The risk of dissipation is arguably the most significant factor in a Mareva injunction application. It forms the central basis upon which the plaintiff seeks this injunction.

[33] In support of its contention that there is a real risk of asset dissipation by the first to fourth defendants, the plaintiff asserts the following:

(a) the plaintiff discovered alleged fraudulent asset dispositions by the principal defendants following their discovery disclosures in the JDS proceedings on 10 June 2024 and 28 August 2024;

(b) the dissipation of assets occurred both prior to and following the award, involving movement of assets from *2018 to 2021* (before the enforcement judgment); and

(c) through this application, the plaintiff seeks to prevent further dissipation of assets aimed at evading satisfaction of the award and the enforcement judgment.

[34] The chronology of the alleged asset dissipation is as follows:

(a) *before the award*: between *15 March 2018 and 7 August 2020*, involving 13 transactions; and

(b) *after the award*: between *26 November 2020 and 13 January 2021*, involving three transactions.

[35] Importantly, there were *no* dissipation of assets after the award was registered on 7 December 2021.

[36] The following timelines are material to my analysis of the risk of asset dissipation:

(a) 15 March 2018–13 January 2021 — transfers took place;

(b) 7 December 2021 — award registered as judgment (enforcement judgment);

(c) 17 December 2021 — plaintiff demanded payment of judgment sum;

(d) 14 February 2022 — garnishee applications filed (against the first defendant's Public Bank accounts and the third defendant's HSBC accounts);

(e) 29 March 2022 — additional garnishee application (against the third defendant's HSBC accounts);

(f) 26 April 2022 — garnishee order absolute obtained against the first defendant;

(g) 26 May 2022 — garnishee order absolute obtained against the third defendant;

(h) 26 May 2022 — JDS proceedings commenced;

(i) 22 August 2022 — first to third defendants' first examination before the Senior Assistant Registrar;

(j) 29 September 2022 — continued examination and discovery orders granted;

(k) 16 March 2023 —instalment payment orders granted;

(l) 10 June 2024 and 28 August 2024 — production of financial documents by the first to third defendants in compliance with the orders made during the JDS proceedings; and

(m) 23 November 2024 — This action and this application were filed.

[37] The foregoing chronology is crucial to my analysis, as it demonstrates the following:

(a) *significant delay*: the alleged dissipation of assets occurred some *three to six years* before this application was filed. Further, the plaintiff had more than *two years*, from May 2022 when the JDS commenced, to seek this Mareva injunction, but chose not to do so;

(b) *knowledge of transfers*: the asset transfers were discovered during the JDS proceedings in 2022, yet this application was only filed *over two years* later in 2024;

(c) *lack of urgency*: this timeline undermines the plaintiff's argument that there is any present or imminent risk of dissipation; and

(d) *abuse of process concerns*: The plaintiff has exhausted *several* avenues to *enforce* the enforcement judgment, including initiating garnishee and JDS proceedings. It appears that, dissatisfied with the outcomes of these proceedings, the plaintiff then chose to file this fresh action and seek a Mareva injunction, which the plaintiff could have applied for in the enforcement judgment court.

[38] Having regard to the circumstances of the present matter, the delay in bringing this application is significant (material) and substantially weakens the plaintiff's claim of an imminent risk of asset dissipation by the defendants. The materiality of any delay is a crucial consideration in a Mareva injunction application and has the potential to vitiate the application (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; and *The Customs and Tax Administration of The Kingdom of Denmark*).

[39] The plaintiff contends that there is a *lack of probity* on the part of the first to third defendants, principally based on the allegation that the asset dissipation occurred *to avoid* the award and the enforcement judgment. However, this argument conflates two distinct issues: the current application is presented as a *pre-judgment* Mareva injunction, whereas such an allegation is typically relevant only in a *post-judgment* Mareva injunction context. Regardless of the approach, the plaintiff is hindered by this fundamental flaw in the application. I have addressed this earlier in this judgment.

[40] In this regard, the following passage from the Court of Appeal decision in *Menk Sdn Bhd v Joerg Hugo Schmidt* [2009] 3 MLJ 205; [2009] 4 CLJ 795 clearly sets out the requirements that a plaintiff or applicant must satisfy for the grant of a *pre-judgment* Mareva injunction:

> [31] Inexplicably, apart from the above excerpt, nothing was discussed about the danger of disposal of the assets defeating a judgment, a requirement that must be established as laid down by the *Aspatra Sdn Bhd* case. It is trite law that in order to succeed in a Mareva injunction application, *dissipation of assets per se is incomplete unless* the applicant *also successfully establishes* the fact that the dissipation *are preemptive acts* that would lead to *an intentional stultifying* of any *judgment* that *may be obtained. The two ingredients must go hand in hand.* (Emphasis added.)

[41] Therefore, the plaintiff's ground in support of this application, namely, that the principal defendants dissipated assets 'to avoid' the award or the enforcement judgment, is untenable. It does *not* constitute a *pre-emptive* act justifying a pre-judgment Mareva injunction, but rather appears to relate to *post-award/enforcement judgment* conduct aimed at aiding enforcement. This is particularly so given that the alleged asset dissipation *all* occurred *prior* to the enforcement judgment.

[42] In a *pre*-judgment Mareva application, *no* judgment has yet been obtained. Accordingly, this application fails to satisfy the requirements set out in *Menk*.

[43] As held in *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261 and *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83:

> The risk of dissipation was *not just a mere possibility*, but *almost a certainty.* (Emphasis added.)

[44] In the circumstances, I find that the plaintiff has failed to demonstrate that there is a 'real' risk of the first to fourth defendants dissipating their assets (*S & F International*; and *Itramas Technology Sdn Bhd v Maju Holdings Sdn Bhd & Ors* [2020] MLJU 1663; [2020] CLJU 1487; [2021] MLRHU 559).

Balance of convenience

[45] A significant concern arises in relation to the overlap between this action and the earlier JDS proceedings, which have already been concluded. In those proceedings, the plaintiff obtained extensive discovery orders, which the Court of Appeal specifically observed would 'invariably involve some element of tracing'. Pursuant to those orders, the principal defendants disclosed bank statements and financial records covering the period from 2017 to 2022.

[46] The plaintiff has already pursued various enforcement avenues in respect of the enforcement judgment, including the JDS and garnishee proceedings. This application for a Mareva injunction appears to be an extension of its recovery efforts and gives rise to a multiplicity of proceedings.

[47] Accordingly, the balance of convenience weighs against the grant of this application (*Bumi Armada*).

The fourth defendant

[48] The fourth defendant is, at most, a passive recipient, not an active dissipator. The plaintiff seeks to impose an asset freeze on an individual who owes no legal obligation to the plaintiff and against whom no allegation of intention to dissipate assets has been made.

[49] The plaintiff has not established any real or specific risk of dissipation by the fourth defendant himself. Instead, it relies on a theory of 'liability by association', premised solely on the fact that he is the son of the judgment debtors. Such reasoning is legally insufficient.

[50] Furthermore, the fourth defendant voluntarily undertook not to deal with the property pending the outcome of this application, a conduct which is inconsistent with any risk of dissipation. It is also relevant that he has held the property for a considerable period without any indication or attempt to dispose of it.

[51] The consequences of granting a Mareva injunction against the fourth defendant would be severely disproportionate, particularly given that he is a 27-year-old junior professional:

(a) a blanket freeze on all accounts would impair his ability to meet basic living expenses and professional commitments;

(b) the reputational stigma attached to a Mareva injunction would jeopardise his standing within his profession and compromise his personal integrity; and

(c) the requirement for worldwide asset disclosure would amount to an unjustified invasion of privacy.

[52] For someone at the outset of his career, the harms outlined above would be enduring and difficult to remedy. Hence, the balance of convenience clearly favours a refusal of this application, in particular against the fourth defendant.

CONCLUSION

[53] In addition to the grounds already stated, I observed from the oral submissions during the hearing of this application that the plaintiff's primary focus is on the property held by the fourth defendant. However, with respect, a Mareva injunction is not the appropriate remedy against the fourth defendant for the reasons I have previously outlined. It appears to me that the plaintiff is, in effect, seeking an interlocutory prohibitory injunction under the principles established in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504. Such an injunction requires the plaintiff to demonstrate, among other things, a serious question to be tried, the adequacy of damages as a remedy, and the balance of convenience. Notably, the requirement to show adequacy of damages does not apply in the context of a Mareva injunction application.

[54] For the reasons stated, this application is dismissed with costs in favour of the first, second, third and fourth defendants.

Application dismissed against first to fourth defendants.

Reported by K Selvaraju